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No. 86-1047

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

UNIT RIG & EQUIPMENT CO., an Oklahoma corporation,
Petitioner,

v.

CARL SHELDON,
Respondent.

OPPOSITION TO A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

John R. Hursh, Esq.
William L. Miller, Esq.
HURSH, MILLER & FASSE, P.C.
105-107 South 6th East
Riverton, Wyoming 82501
(307) 856-4157

Attorneys for Respondent
Carl Sheldon

QUESTION PRESENTED FOR REVIEW

I. WAS THE COURT OF APPEALS' DETERMINATION OF AN UNSETTLED QUESTION OF THE LAW OF THE STATE OF WYOMING IMPROPER UNDER *Erie Railroad Company v. Tomkins*, 304 U.S. 64, 82 L.Ed. 1188?

TABLE OF CONTENTS

PAGE

Question Presented for Review.....i

Table of Contents.....ii

Table of Authorities.....iii

Statement of the Case.....2

Reasons for Denying the Writ.....3

Conclusion.....5

TABLE OF AUTHORITIES

Cases: Page:

Cline v. Sawyer,
600 P.2d 725 (Wyo. 1979).....4, 5

Erie Railroad Company v. Tompkins,
304 U.S. 64, 82 L.Ed. 1188.....4

NLRB vs. Pittsburgh S.S. Co.,
340 U.S. 498 (1951).....3

Statutes:

Wyo. Stat. § 1-1-109 (1977).....2
Wyo. Stat. § 1-1-109 (as amended 1986).....2

Other Authorities:

Poland v. Goodyear Tire and Rubber Co.,
No. C83-0378 (June 24, 1984, D. Wyo.).....4, 5

Supreme Court Rule 17.....3, 5

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The respondent, Carl Sheldon, respectfully files his opposition to the Petition for Writ of Certiorari in this case.

STATEMENT OF THE CASE

Petitioner's brief is adopted with the following additions:

1. Carl Sheldon was rendered one hundred percent disabled from his injuries. The original jury verdict of $540,000.00 reflected his loss of wages, and no other element of damages. The Tenth Circuit reduced this recovery to $324,000.00.

2. The jury made a general verdict in favor of the respondent, Sheldon, in addition to the percentages of negligence set out. At the motion for new trial, Unit Rig's attorney agreed with the trial judge that the instructions as given included a warranty instruction. The Tenth Circuit also found that the warranty instruction was given. That point was not raised on appeal. The jury made a finding of breach of warranty against Unit Rig.

3. Wyo. Stat. § 1-1-109 (1977) has since been modified by legislative action, and would allow Sheldon to recover a portion of his damages under the present Wyoming negligence statute. Wyo. Stat. § 1-1-109 provided, at the time of trial, that for a plaintiff to recover, his negligence had to be less than 50 percent, and less than the negligence of the defendant against whom he was seeking judgment. Wyo. Stat. § 1-1-109 has been changed to provide that a plaintiff's negligence must be less than 50 percent of the negligence, but that the negligence of all the defendants is combined to make that determination, and each defendant is responsible for his percentage of the negligence. So, in this case, under negligence theory, Unit Rig would be responsible for 30 percent of Carl Sheldon's damages. *See* Wyo. Stat. § 1-1-109, as amended 1986.

REASONS FOR DENYING THE WRIT

1. This case involves issues important only to the parties hereto, and not to the public in general. This is especially true with the modifications now made to the Wyoming comparative negligence statute. In all likelihood, the Tenth Circuit's decision will affect very few cases, even in Wyoming. Certiorari is normally granted only in cases involving issues important to the public in general, and not to individual parties. *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498 (1951).

2. This case presents no important or special reason for granting certiorari, and does not fall within any of the reasons set forth in Rule 17 of the Supreme Court Rules.

3. Unit Rig's petition for rehearing to the Tenth Circuit was denied 9-0. (*See* Appendix C to Petition for Writ of Certiorari.) Judge Barrett, the active Tenth Circuit Judge from Wyoming, did not request en banc consideration, even though he was not on the original panel which heard the case. Evidently, Judge Barrett did not feel Wyoming law had been misconstrued.

4. The Court of Appeals was faced with making a determination of an unsettled question of Wyoming law; i.e., the effect of the comparative negligence statute on a warranty claim. The trial judge chose to ignore the effects of the warranty claim as it pertains to the Wyoming comparative negligence statute. On appeal, Unit Rig stipulated that the warranty issue was, in fact, before the jury, along with the negligence question; and that the jury's general finding in favor of the plaintiff was, in fact, a finding for the plaintiff on the question of warranty. The trial judge dealt with the issue of comparative negligence only, which left the warranty issue for the Court of Appeals to determine what the Wyoming law would be, under the facts of this case. The Court of Appeals had to anticipate what the Wyoming Supreme Court would do when confronted with the issues in this case.

5. The learned opinion of Judge Timbers, sitting by designation on the Tenth Circuit, correctly observed that

the Wyoming comparative negligence statute applies only to negligence actions. The statute does not deal with warranty claims. The question of the effect of the comparative negligence statute in Wyoming, now repealed, at the time of this case on warranty questions and products liability cases was undecided. There was no specific Wyoming decision to follow.

6. The Wyoming Supreme Court in *Cline v. Sawyer*, 600 P.2d 725 (Wyo. 1979), stated the general proposition that "contributing fault is a proper consideration in *fixing damages* in *construction cases* premised on breach of warranty." It is significant that the Wyoming Supreme Court did not say that contributing fault is a proper consideration in fixing liability. Further hints of tendencies in the jurisdiction of Wyoming was found in *Poland v. Goodyear Tire and Rubber Co.*, No. C83-0378 (June 24, 1984, D. Wyo.), wherein the federal district court, by a different judge, instructed his jury that contributory negligence does not bar recovery in a warranty action, but simply reduces the damages accordingly. This reference is found in footnote 3 of the Circuit Court's opinion.

7. The Tenth Circuit, in making its *Erie* determination, correctly applied the dictum in *Cline v. Sawyer*, that in warranty cases, the contributory negligence is used to balance the damages, and not liability. That was also consistent with the practice of the other federal district judge for Wyoming. All indications available to the Tenth Circuit were that the Wyoming Supreme Court will follow its dictum at such time as the issue is presented to it.

8. The Court of Appeals then properly noted that other jurisdictions have followed the rule announced in its opinion where the plaintiff's damages were reduced in proportion to his determination of negligence on a warranty claim. These cases are cited in footnote 3 of the Circuit's opinion.

9. There are no Wyoming decisions denying recovery in a warranty claim for injuries caused by a defective

product or where the degree of negligence or fault of the plaintiff is greater than that of the defendant, manufacturer, or dealer.

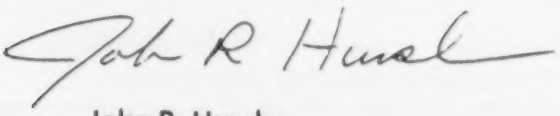
CONCLUSION

The Circuit Court did not misconstrue the *Cline v. Sawyer* case law or misapply the state's comparative negligence statute under a product liability case. The comparative negligence statute under which this case was decided has been repealed by the Wyoming Legislature and, except for this case, the question is an academic one. A breach of warranty was found by the jury and stipulated to by Unit Rig's counsel at oral argument. The question for the Court of Appeals was, what would the Wyoming Supreme Court decide, should the case be presented. The determination made by the Court of Appeals was consistent with the dictum in *Cline v. Sawyer*, and the instruction given by the federal court in the case of *Poland v. Goodyear Tire and Rubber Co.*, No. C83-0378 (June 24, 1984, D. Wyo.). It further has a basis in law from other jurisdictions.

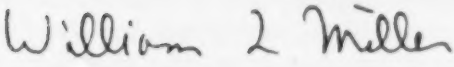
This case presents no issues of national significance, constitutional questions, federal questions or conflicts of circuits, as required by Rule 17 of the Supreme Court.

For the reasons set forth herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



John R. Hursh



William L. Miller

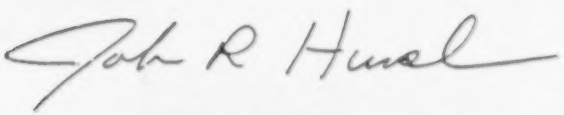
HURSH, MILLER & FASSE, P.C.
105-107 South 6th East
P.O. Box 1783
Riverton, Wyoming 82501
Telephone: (307) 856-4157

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I, John R. Hursh, one of the attorneys for the respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 19th day of January, 1987, I served copies of this Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, by mailing copies in a duly addressed envelope, with first class postage prepaid, to the following attorneys of record:

Glenn Parker
Thomas G. Gorman
Byron Hirst
HIRST & APPLEGATE
200 Boyd Building
P.O. Box 1083
Cheyenne, Wyoming 82003



John R. Hursh
HURSH, MILLER & FASSE, P.C.
105-107 South 6th East
P.O. Box 1783
Riverton, Wyoming 82501
Telephone: (307) 856-4157
Attorneys for Respondent

AFFIDAVIT OF MAILING

I, John R. Hursh, one of the attorneys for the respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 19th day of January, 1987, I deposited in the United States Post Office located at Riverton, Wyoming, with first class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing, this Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

John R. Hursh

John R. Hursh
HURSH, MILLER & FASSE, P.C.
105-107 South 6th East
P.O. Box 1783
Riverton, Wyoming 82501
Telephone: (307) 856-4157
Attorneys for Respondent

STATE OF WYOMING)
: ss.
County of Fremont)

SUBSCRIBED AND SWORN to before me this 19th day of January, 1987.

Carole Henning
Notary Public

My commission expires:
4-6-87